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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CALIFORNIA COMMERCE CLUB, INC., DOING BUSINESS AS COMMERCE HOTEL AND CASINO, Employer, and WILLIAM J. SAUK, Charging Party.	No. 21-CA-149699 **MOTION FOR RECONSIDERATION**

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page

Federal Cases

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

State Cases

TABLE OF AUTHORITIES (cont'd)

Page

NLRB Cases

Federal Statutes

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

Regulations

Other Authorities

I. INTRODUCTION

The Charging Party requests the Board (three members and vacant and vacant) reconsider their decision finding the confidentiality clause a lawful restriction on the right of employees to share information about working conditions and that the arbitration agreement waives the right of employees to bring class or collective actions.

The Board fundamentally erred"

- The Federal Arbitration Act does not apply.
- The arbitration agreement violates state law.
- The arbitration agreement cannot waive rights of employee to bring class or collective actions under various state or federal laws.
- State invalidates the confidentiality clause.
- The arbitration agreement and confidentiality clause are invalid because it restricts or eliminates rights under federal laws relating to employment.
- The arbitration agreement and the confidentiality clause are invalid because it restricts or eliminates rights under state laws relating to employment.
- The arbitration agreement and confidentiality clause are invalid because they restrict or eliminate rights to bring claims in arbitration
- The arbitration agreement and confidentiality clause are invalid because it restricts or eliminates rights of other employees than the charging party to engage in section 7 activities.
- The arbitration agreement confidentiality clause is invalid because it restricts or eliminates rights of employees of other employer to engage in section 7 activities.
- The Board not even acknowledges or considers these other factors in reaching its decision.
- The Board improperly rewrote the arbitration agreement.
- The arbitration agreement and confidentiality clause violate state and federal law.

Preliminarily we label the arbitration agreement the Forced Unilateral Arbitration Procedure or FUAP for short.

Charging Party closely hews to the issues as framed by the Complaint of General Counsel and as described by the Board:

> On July 29, 2015, the General Counsel issued a complaint alleging that the Respondent was violating Section 8(a)(1) of the Act by maintaining the Agreement on the basis that it requires employees to waive their right to pursue class or collective actions. The complaint further alleges that the confidentiality provision separately violates Section 8(a)(1) on the basis that "employees would reasonably conclude that [it] interfere[s] with employees' ability to discuss topics protected by Section 7 of the Act and therefore preclude[s] employees from engaging in conduct protected by Section 7 of the Act."

Decision p. 1.

We address both issues before. If the FAA does not apply as we demonstrate that it doesn't then the arbitration agreement and its confidentiality clause are invalid. If the FAA does apply and no exception or other argument applies, then *Epic Systems Corp. v Lewis*, 584 U.S. (2018)(Epic Systems) governs. But as we show there are numerous reasons why the FAA does not apply. In any case even if the FAA does apply to this agreement, the confidentiality clause is independently invalid.

II. THE BOARD IMPROPERLY BALANCED INTEREST AND IMPROPERLY REWROTE THE ARBITRATION AGREEMENT

For reasons discussed below, however, there are additional and related reasons why the FUAP confidentiality clause is unlawful. We address the application of the Federal Arbitration Act first. If it doesn't apply, the Board's Decision must be vacated.

We begin by noting the breadth of the confidentiality provision:

> "The arbitration shall be conducted on a confidential basis and thee shall be no disclosure of evidence or award/decision beyond the arbitration proceeding."

This absolutely prohibits disclosure of any evidence used or introduced during the proceeding. But under the JAMS process, once JAMS is notified the arbitration proceeding begins

confidentiality applies. So a worker could not disclose the name of the arbitrator, any disputes about his choice or conflicts or any evidence brought forward throughout the entire process. The arbitration award could not be disclosed in another proceeding involving the same employee or others. It could not be disclosed to the State Bar to complain about the conduct of the arbitrator or a lawyer. It could not be used as collateral estoppel or res judicata. The employer could create a confidentiality ban by introducing adverse information it wanted kept confidential. One employee could not be a witness for another employee because the employee who brings the claim could not explain why he needs the employee. Further the employee witness would be bound by the confidentiality agreement and could not disclosure what he said even though he did not bring the claim. The employee could not refer an arbitration award to a collection agency. This all directly interferes with the section 7 right of the employee who is only a witness.[1] Evidence could not be introduced in a court proceeding to see to set aside the award. The employee could not seek to have the attorney representing the employer disbarred for creating false evidence. It is so broad as to encompass virtually everything. The employer could not respond to a lawful subpoena from a third party. A worker could not disclose a threat to fire him made during the procedures for even bringing the claim. And it is not limited to the arbitration hearing.

As the Board noted the courts are admonished to "'rigorously enforce' arbitration agreements according to their terms. [citation omitted]." Slip Opinion p 4. This applies to the confidentiality provision. Here the Board rewrote the arbitration provision by interpreting it to allow disclosure of information presented at the arbitration as long as it was obtained otherwise also. But that is not the language of the confidentiality provision. The Board has improperly narrowed the provision by reinterpreting the language. Employee could not even disclose the existence of the arbitration.[2] The employer could not consult with anyone including an attorney

[1] This would even apply if the employer subpoenaed the employee as a witness.

[2] It is even so broad as to be illegally retroactive to apply to pre-employment recruitment.

regarding the arbitration. It is so broad to prohibit the employee from hiring a lawyer or other representative.

The Board ignored its long history of finding any provision which makes disclosure of working conditions unlawful. See, even very recently, *G & E Real Estate Management Services*, 369 NLRB No 121, p . 4 (2020). See also Decision at p 4 citing cases. The balance if even applicable strongly favors workers right to disclose rather than an employer's right to silence workers.

III. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT, NO TRANSACTION AND NO CONTROVERSY

The Board assumes without any evidentiary support that the FAA applies. Mr. Sauk had made no claim against the employer. There was no transaction or controversy subject to the FAA.

Preliminarily the FAA does not regulate the business or commercial activity of the Respondent. It is limited to arbitration that is it. The fundamental issue is whether for application of the FAA and for application of the FAA consistent with the Commerce clause, does there have to be proof that arbitration or the dispute subject to that mechanism affect commerce?

The FAA applies only where there is "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2. Under the FAA, there must be some other "contract … involving commerce."

The Supreme Court's seminal decision applying the FAA is expressly conditioned upon the existence of an employment contract:

> Respondent, at the outset, contends that we need not address the meaning of the § 1 exclusion provision to decide the case in his favor. In his view, an employment contract is not a "contract evidencing a transaction involving interstate commerce" at all, since the word "transaction" in § 2 extends only to commercial contracts. See *Craft*, 177 F.3d, at 1085 (concluding that § 2 covers only "commercial deal[s] or merchant's sale [s]"). This line of reasoning proves too much, for it would make the § 1 exclusion provision superfluous. If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in ... interstate commerce" would be pointless. See, e.g.,

> *Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"). The proffered interpretation of "evidencing a transaction involving commerce," furthermore, would be inconsistent with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), where we held that § 2 required the arbitration of an age discrimination claim based on an agreement in a securities registration application, a dispute that did not arise from a "commercial deal or merchant's sale." Nor could respondent's construction of § 2 be reconciled with the expansive reading of those words adopted in *Allied–Bruce*, 513 U.S., at 277, 279–280, 115 S.Ct. 834. If, then, there is an argument to be made that arbitration agreements in employment contracts are not covered by the Act, it must be premised on the language of the § 1 exclusion provision itself.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113-14 (2001); See also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (an arbitration provision is severable from the remainder of the contract). See also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (finding "a contract evidencing a transaction involving commerce" as a prerequisite to the application of the FAA).

There is no contract. The FUAP creates no contract. The Respondent has offered no evidence that it creates any contract of employment with any employee. The Board found none. Thus the only alleged agreement is the FUAP, nothing else.

Assuming that this is a limited contract on one issue alone, the FUAP effectively disclaims a contract on any other employment issue. Thus the only contract on which the FAA may be applied would be "employment at-will."[3]

Assuming that the FUAP standing alone is a contract, that contract of employment does not affect commerce. See, *infra*. The FAA applies to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." There is no transaction here affecting commerce by the FUAP, assuming it is the only contract. There is no evidence in the record of how such contract can affect commerce.

This FAA by its explicit terms does not apply absent proof of a contract. Respondent has failed to establish the existence of a contract.

[3] As we note below this precludes the application of the FUAP to any other state or federal law and renders it substantively invalid.

Below, we show there is no transaction and no controversy. The reason of course is that no employee has presented a claim or transaction since the FUAP prevents the vindication of any right and the employees have been thoroughly intimidated so that they have not exercised their section 7 rights under the FUAP. It is just like any employer who maintains an invalid no solicitation rule, there is no solicitation which the Act protects because employees are afraid of losing their jobs if the violate company rules.

Below we address the question of whether the FAA can apply to activity which does not affect commerce. The Board did not address this issue. Assumed or hypothetical jurisdiction is prohibited. *Ex parte McCardle*, 74 U.S. 506, 514 (1868). *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 101-102 (1998).

IV. THE BOARD MUST ADDRESS THE CONSTITUTIONAL ISSUE OF WHETHER THE FAA CAN BE APPLIED TO ACTIVITY WHICH DOES NOT AFFECT COMMERCE

A. INTRODUCTION

The Board has never addressed squarely the question of whether the FAA may be applied to a FUAP without constitutional concerns under the Commerce Clause. We address those issues below. [4]

First, assuming there was an individual contract, there is no showing that such a contract that includes the FUAP affects commerce. Second, we agree that an employment dispute itself is an activity, and the employer must show that activity affects commerce. Third, the employer must show that the dispute resolution activity of individual arbitration or group arbitration affects commerce. Fourth, there is no "transaction" triggering the FAA. Here, the employer failed to establish any constitutional basis to apply the FAA.

There is no inconsistency in the regulation of activity encompassed within the National Labor Relations Act and finding no commerce activity regulated by the FAA. The Act regulates the employer; the activity regulated is activity of employees and employers and labor

[4] Even though the Charging party was not a transportation worker, the fallacy of the Board's analysis becomes apparent where it would not apply to such transportation workers not covered by the FAA.

organizations. In contrast, the FAA regulates only a targeted activity: arbitration. It does not purport to apply to employees, unions or employers and their "concerted activity for mutual aid or protection." Thus, there is no inconsistency. Here, the commerce clause issue is squarely placed. The commerce finding exists only for the activity of the employer as a casino and hotel. There is no allegation that that the commerce data had anything to do with any employment dispute. With that very minimal commerce allegation, we proceed to analyze whether the FAA can apply.

B. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT INVOLVING INTERSTATE COMMERCE

By its own terms, the FAA applies only to arbitration provisions that appear in a "contract evidencing a transaction involving commerce" (9 U.S.C. § 2), where commerce is defined as "commerce among the several States or with foreign nations." 9 U.S.C. § 1. The Supreme Court has held that under this language, "the transaction (that the contract evidences) must turn out, *in fact*, to have involved interstate commerce." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (emphasis in original).[5]

Thus, the FAA cannot be applied unless there is proof that the contract containing the arbitration provision involved a transaction that in fact affects interstate commerce. *Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.*, 538 F. Supp. 2d 468, 473 (D.P.R. 2008) ("[T]he FAA . . . only applies when the parties allege and prove that the transaction at issue involved interstate commerce") (citing *Medina Betancourt et al. v. Cruz Azul de P.R.*, 155 D.P.R. 735, 742–43 (2001)); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 106 (N.D. Ill. 1980), *aff'd*., 653 F.2d 310 (7th Cir. 1981) ("Interstate commerce is a necessary basis for application of the [FAA]").

In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Supreme Court found that the FAA did not apply did not apply to an employment contract between *Polygraphic*

[5] The Court in *Allied-Bruce* also clarified that "the word 'involving' is . . . the functional equivalent of the word 'affecting.'" 513 U.S. at 273–74.

Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of the company's lithograph plant in Vermont. The Court found that the contract did not "evidence a transaction involving commerce within the meaning of section 2 of the Act" because there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce." *Bernhardt*, 350 U.S. at 200-01.

Similarly, in *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157MHP, 2007 WL 2255221 (N.D. Cal. Aug. 3, 2007), the court found that an "employment contract [did] not involve interstate commerce as required by the [FAA]" where an employee "was employed at a single location," "his employment did not require interstate travel," and "his activities while employed with defendants as well as the events at issue in the underlying suit were confined to California." See also *Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex. App. 2003) (holding FAA not applicable where services performed were confined to Texas).

There is no evidence that the transaction between the parties here involves interstate commerce. Employees who perform work in only one state are not engaged in activity that affects interstate commerce. There is no claim that the business extends beyond Commerce, California and thus there is no evidence of any impact whatsoever on interstate commerce. Disputes that arise between any of its employees and Commerce may be simple, local disputes governed only by state law, like one missed meal period or rest break. Some disputes might not even be economic, but just claims seeking to resolve personality issues or shift assignments or workplace duties. Whether this kind of local dispute is submitted to individual or group arbitration in its final stages will not make any difference for interstate commerce.[6] Yet the FUAP purports to govern all this activity, no matter how trivial or local. Such a private arbitration agreement with an individual who does not perform work across state lines, does not transport goods across state lines, and is not seeking to enforce anything other than state law is

[6] For an example of a dispute where no party asserted the FAA applied, see *Carmona v. Lincoln Millennium Car Wash, Inc., supra.*

not a contract evidencing a transaction involving interstate commerce.

The character of the card room's hospitality business does not alter this conclusion.[7] The relevant question here is whether the transaction *between the parties* has an effect on interstate commerce. The fact that one of the parties to the transaction is *independently* involved in interstate commerce does not bring every contract that party enters, no matter how trivial or local, within the reach of the FAA. Even though *Polygraphic Co.* was an employer that engaged in interstate commerce and operated lithograph plants in multiple states, the Supreme Court still determined that the arbitration agreement in the employment contract between `. and Bernhardt did not involve interstate commerce. *Bernhardt*, 350 U.S. at 200-01. Even though Respondent is engaged in ship repair business that may impact interstate commerce, an arbitration agreement between Respondent and an individual employee who does not perform work across state lines is still an agreement about how to resolve generally local disputes that does not involve interstate commerce. As the court observed in *Slaughter*, "[t]he existence of national companies . . . does not undermine the conclusion that the activity is confined to local markets. Techniques of modern finance may result in conglomerations of businesses. . . . [but] the reaches of the Commerce Clause are not defined by the accidents of ownership." *Slaughter v. Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *7 (N.D. Cal. Aug. 3, 2007).

Similarly, the purchase of product from other entities that received the product from out of state does not transform the local nature of the agreement to arbitrate, since those purchases are not part of the arbitration agreement but are merely incidental to the transaction. Those purchases are not governed by the FUAP. See *Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) ("The facts that the nursing home buys supplies from out-of-state vendors . . . are insufficient to impress interstate commerce regulation upon the admission contract for residential care between the Oklahoma nursing home and the Oklahoma resident patient."); *Saneii v. Robards*, 289 F.Supp.2d 855, 860 (W.D. Ky. 2003) (The sale of residential

[7] The record does not establish that these ships are even in U. S. territorial waters. If the work is performed overseas, the Act does not apply extraterritorially.

real estate to an out-of-state purchaser had "no substantial or direct connection to interstate commerce," since any movements across state lines were "not part of the transaction itself" but merely "incidental to the real estate transaction"); *City of Cut Bank v. Tom Patrick Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998) (The purchase of insurance and materials from out of state did not impact court's decision that construction contract was a local transaction, not involving interstate commerce).

Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003), does not change the analysis. In that case, the Supreme Court held that the FAA could be applied in cases where there was no showing that the individual transaction had a specific affect upon interstate commerce, so long as "in the aggregate the economic activity in question would represent a general practice subject to federal control" and "that general practice bear[s] on interstate commerce in a substantial way." *Alafabco*, 539 U.S. at 56–57 (internal citations omitted). Under this standard, the Court found that the application of the FAA to certain debt-restructuring contracts was justified given the "broad impact of commercial lending on the national economy" and the facts that the restructured debt was secured by inventory assembled from out-of-state parts and that it was used to engage in interstate business. *Alafabco*, 539 U.S. at 57–58.[8] As courts have observed, the logic used by the *Alafabco* court to justify the application of the FAA to a large financial transaction between a bank and a multistate manufacturer is not readily applicable to a private arbitration agreement covering claims that a local employment contract has been breached. *Slaughter v. Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *4 (N.D. Cal. Aug. 3, 2007) (distinguishing the "debt-restructuring contracts involving a manufacturer" at issue in *Alafabco* from a contract "for service type employment that occurred solely within the state"); see also *Bridas v. Int'l Standard Elec. Corp.*, 490 N.Y.S.2d 711, 717 n.3 (N.Y. Sup. Ct. 1985) (contrasting "an agreement based upon a multimillion dollar transfer of stock between an American and Argentine corporation" and the simple allegation of breach of an employment

[8] Notably, private arbitration agreements on their own were not held to constitute a "general practice" that "bear[s] on interstate commerce in a substantial way." Instead, the Court relied on other characteristics of the transaction at issue to find the required connection to interstate commerce.

contract at issue in *Bernhardt*). Private arbitration agreements with employees who do not perform work across state lines, do not transport goods across state lines, and are not seeking to enforce anything other than state law are not contracts that involve interstate commerce in the way major debt-restructuring contracts did.

The FAA cannot be stretched so far as to apply to any arbitration agreement between an individual and his employer just because the employer is, for other purposes, engaged in interstate commerce. Such a reading of the FAA would contravene the Supreme Court's decision in *Bernhardt*[9] and raise serious constitutional concerns.[10]

There is no transaction or controversy. Below in Part D we show there is not "controversy" so the FAA does not apply.

C. THIS CASE IS BEYOND THE CONSTITUTIONAL REACH OF THE FAA SINCE THERE IS NO SHOWING THAT THE DISPUTES COVERED BY THE FUAP AFFECT INTERSTATE COMMERCE OR THAT THE ACTIVITY OF RESOLVING THOSE DISPUTES AFFECTS INTERSTATE COMMERCE

Under the Commerce Clause, Congress may only regulate "'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2578 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Because the FAA was enacted pursuant to the Commerce Clause (*Perry v. Thomas*, 482 U.S. 483, 490 (1987)), it cannot constitutionally be applied here unless the regulated activity has this connection to interstate commerce.

The fact that the employer in this case is for other purposes and independently engaged in interstate commerce cannot supply the necessary connection to commerce, because the FAA is not a regulation of the employer or the employer's business. In *Sebelius*, the Supreme Court

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[9] In *Bernhardt*, the Court explained that the FAA should be construed narrowly, so as not apply to an arbitration agreement between a multistate lithograph company and an employee who did not work across state lines. The Court warned that allowing the FAA to reach such transactions that did not affect interstate commerce would impermissibly "invade the local law field." *Bernhardt*, 350 U.S. at 202.

[10] In effect this would mean that once commerce jurisdiction is established for one purpose, it would be established for all federal question purposes.

made it clear that Congress may only use its authority under the Commerce Clause "to regulate classes of *activities*," "not classes of *individuals*, apart from any activity in which they are engaged." *Sebelius*, 132 S.Ct. at 2591 (emphasis in original). Thus, in determining whether a regulation is permissible under the Commerce Clause, the court must not look at the class of individuals affected by the law, but at the actual activities that are being targeted by the law. Following this analysis, the Court ruled that the individual mandate could not be characterized as a regulation of individuals who would eventually consume healthcare, because that is just a class of individuals and not the actual activity regulated by the ACA. *Id*. at 2590-91. Similarly here, the FAA cannot be characterized as a regulation of employers engaged in interstate commerce, because that is just a class of corporate individuals and not the actual activity regulated by the FAA.

The actual activity regulated by the FAA is the resolution of disputes between private individuals. The FAA does not seek to regulate how the employer conducts its business or carries out its commercial activities. The FAA does not purport to regulate any activity other than the narrow aspect of dispute resolution in arbitration.[11] This is the actual activity Congress sought to regulate in the FAA, and such a law passed pursuant to the Commerce Clause cannot be constitutionally applied to the dispute resolution activity here unless this activity is connected to interstate commerce. See *Sebelius*, 132 S.Ct. at 2578.

The activity of resolving disputes between private individuals is not a "channel of interstate commerce," it is not a person or thing "in" interstate commerce, and whether the disputes covered by the FUAP here are resolved in individual or group arbitration does not "substantially affect interstate commerce." *Sebelius*, 132 S.Ct. at 2578 (quoting *Morrison*, 529 U.S. at 609). Many of the disputes covered by the FUAP do not implicate interstate commerce or have any substantial effect on interstate commerce. The FUAP is drafted in a way that would extend to any employment dispute. It could encompass a claim for one hour's pay, one missed meal period or rest break, or any other claim that has no impact whatsoever on interstate

[11] In contrast the NLRA regulates dispute resolution though strikes and boycotts.

commerce. It would encompass a claim that was not economic at all, but just an effort to resolve personality issues or shift assignments or workplace duties. If two employees had a "conflict" that was not economic and asked for joint collective arbitration, that dispute would not have any impact on interstate commerce. All non-economic disputes that would have no impact on commerce are covered. Such local disputes governed by state contract law or state labor law lack any substantial connection to interstate commerce. If the dispute does not affect interstate commerce, regulation of the resolution of the dispute is not within the scope of the Commerce Clause, and the FAA cannot constitutionally apply. Whether a dispute between Coastal and any of its employees is ultimately resolved in individual or group arbitration does not have an impact on any issue of interstate commerce. Because the employer has not shown that the disputes covered by the FUAP would affect interstate commerce or that the activity of resolving those disputes in individual or group arbitration would affect interstate commerce, the FAA cannot constitutionally be applied here.

Even though the FAA cannot constitutionally target the dispute resolution activity here,[12] the NLRA can constitutionally regulate dispute resolution activity between employers and their employees. This is not anomalous. The NLRA was passed pursuant to explicit Congressional findings that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce." 29 U.S.C. § 151. The Supreme Court has explained that Section 7 of the NLRA embodies the effort of Congress to remedy this problem. *NLRB v. City Disposal Sys. Inc*., 465 U.S. 822, 835 (1984) ("[I]t is evident that, in enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and

[12] The courts in *Stampolis v. Provident Auto Leasing Co*., 586 F.Supp.2d 88 (E.D.N.Y. 2008), and *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), recognized that litigation is different from the activity of the entity involved in the litigation. See also *Rodriguez v. Testa*, 296 Conn. 1, 26, 993 A.2d 955, 969 (2010) (finding statute constitutional under Commerce Clause because it regulates industry, not litigation).

conditions of their employment."). The NLRA can thus reach dispute resolution as a necessary part of its regulation of the employment relationship, designed to address the inequality in bargaining power that burdens interstate commerce. See *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 37 (1937) (recognizing that regulation of local, intrastate activity is permissible as a necessary part of a larger regulatory scheme). Unlike the NLRA, the FAA is not a larger regulation of employment and does not seek to change the fundamental ways employers and workers relate to each other in order to confront the labor strife that impedes interstate commerce. It seeks to regulate the private dispute resolution activity of individuals apart from its content or context and this is impermissible.

Congress may not focus on the intrastate dispute resolution activities of private individuals apart from a larger regulation of economic activity. See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)) (The Court has never declared that "'Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.' Rather, 'the Court has said only that *where a general regulatory statute bears a substantial relation to commerce*, the de minimis character of individual instances arising under that statute is of no consequence.'" (emphasis in original)). The Supreme Court has said that regulation of intrastate activity is permissible where it is one of the "essential parts of a larger regulation of economic activity" and the "regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The relevant statutory regime here is the FAA. By its terms, the FAA addresses only individual transactions. 9 U.S.C. § 2 (applying the terms of the act to "a written provision in any maritime transaction or contract evidencing a transaction involving commerce"). Therefore, the regulatory scheme does not encompass wide sectors of economic activity in a general fashion but rather applies to individual transactions or contracts. Regulation of a local dispute that does not itself have any effect on interstate commerce is not a necessary part of the regulatory scheme. Similarly, failure to enforce arbitration provisions in purely intrastate contracts would not subvert the entire statutory scheme in the same way as the failure to regulate purely intrastate marijuana production

would undercut regulation of interstate marijuana trafficking. *Gonzales v. Raich*, 545 U.S. 1, 26 (2005). Because regulation of the intrastate activity here is "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," it "cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. As a result, there are no constitutional grounds for applying the FAA to intrastate dispute resolution activity that bears only a trivial affect on interstate commerce.

Because the application of the FAA depends on the Commerce Clause, and because the forum in which this employment dispute is resolved does not have a substantial affect on interstate commerce, the FAA cannot be used to prohibit or interfere with protected concerted activity under the NLRA.

D. THERE IS NO "CONTROVERSY" SUBJECT TO THE FAA

The Board ignored this issue.

The FAA applies to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." There is no controversy here. No employee has asserted any claim. No employee has asserted any claim because the FUAP is not an effective means of resolving individual or group claims. Group or class claims are prohibited. The FAA is only triggered by its terms when there is a "controversy." None exists here except whether the provision violates the Act.[13] Thus, until a concrete controversy develops, the FAA cannot be applied. None exists precisely because it is illegal. Like any unlawful employer maintained rule, the rule serves its purpose to prevent the lawful conduct. Such rules effectively chill employees' rights and thus serve their intended purpose.

E. SUMMARY

In summary, the National Labor Relations Act may regulate the activities of this

[13] This proves the chilling effect of the language prohibiting group claims.

employer because of the impact on commerce. No one disputes that. The Federal Arbitration Act, however, regulates the specific activity of dispute resolution in the form of arbitration, and that activity does not affect commerce within the Commerce Clause. Alternatively, the FAA regulates only employment disputes that affect commerce. Further, there is no contract subject to the FAA nor is there any controversy subject to the FAA. Finally there is no controversy.

The Board must address this constitutional issue. It cannot do so by applying the doctrine of constitutional avoidance. Here, Board relied on the FAA. Either it applies or it doesn't. The Board cannot duck and weave and avoid. If it does the Court of Appeals will have to face the issue/

V. THE APPLICATION OF THE FEDERAL ARBITRATION ACT CANNOT OVERRIDE THE IMPORTANT PURPOSES OF OTHER FEDERAL STATUTES THAT ALLOW EMPLOYEES TO SEEK RELIEF FROM THE FEDERAL GOVERNMENT FOR THE BENEFIT OF THEMSELVES AND OTHER WORKERS

The Board must address directly the question of whether the Federal Arbitration Act may override the application of the National Labor Relations Act as to other federal statutes that allow whistle-blowing or independent administrative remedies. *Epic Systems Corp. v. Lewis*, 584 U.S. __ (2018) does not deal with this issue. Here the more narrowly placed issue is whether an arbitration agreement can enforce a confidentiality clause to prevent the disclosure of information to enforce and administer federal laws. Here, we point out that the FUAP provision effectively undermines those other federal statutes. Thus, the confidentiality restriction found in the FUAP, would interfere with other federal statutory schemes, which envision and, in some cases, require remedies that will affect a group. Similarly to the extent the confidentiality provision prohibits enforcement of whistleblowing, it is not saved by the FAA. The Board has been admonished by the Supreme Court in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), that it must respect other federal enactments.[14] Here, the Board should recognize that

[14] Any assertion by Respondent that the FAA trumps the NLRA is another example. The FUAP unlawfully restricts access to the NLRA by only allowing employees to raise a claim that the NLRA governs by bring it to the Board. This would foreclose a preemption analysis in court or an argument that the NLRA makes the conduct unlawful in court proceeding such as Epic System. Under this provision the employer cannot defend the validity of the FUAP under the NLRA.

there are many federal statutes that allow whistleblowing and a confidentiality provision interferes with that right. The FAA cannot be used to defeat the purposes of those statutes.

Employees have the right to bring to various federal agencies all kinds of issues that affect them and other workers. Under these statutes, they have the right to seek relief from those agencies for their own benefit as well as for the benefit of other workers or employees of the employer. Those remedies can involve government investigations, injunctive relief, and federal court actions by those agencies, and debarment from federal contracts, workplace monitoring and many other remedies that would be collective and concerted in nature.

In effect, the FUAP would prohibit an employee from invoking on his/her behalf, as well as on behalf of other employees, protections of these various federal statutes. It would prohibit the agency or the court from remedying violations of the law that the agency or court would be empowered, if not required, to remedy.

The Congressional Research Service has identified forty different federal laws that contain anti-retaliation and whistleblower protection. *See Jon O. Shimabukuro et al., Cong. Research Serv. Report* No. R43045, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (April 22, 2013), *available at* http://fas.org/sgp/crs/misc/R43045.pdf. These are all laws that relate directly to workplace issues. Nothing in the Federal Arbitration Act preempts the application of other federal laws. Some examples are mentioned below. Here the confidentiality provision would prohibit any of these actions where it was based in whole on it part on disclosures made during the arbitration process.

The Federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*., allows for the District Courts to grant injunctive relief to "restrain violations of [the Act]." See 29 U.S.C. § 217. The application of the FUAP would prevent an individual or a group of individuals from seeking injunctive relief that would apply to all employees or apply in the future to themselves and other employees. It would undermine the purposes behind the FLSA to allow for such injunctive relief.[15]

[15] Even a claim by an employee that she was not paid for overtime after 40 hours, as required by the

The same is true with respect to ERISA, 29 U.S.C. § 1001, *et seq*. But see, *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019). The FUAP would prohibit an employee disclosing a claim involving a benefit covered by ERISA, even though the statute expressly allows for equitable relief. 29 U.S.C. § 1132(a)(1) and (3). And as noted below by extending this expressly to "all disputes that may rise out of or be related in any way to my employment, " the FUAP violates ERISA. Thus the prohibition against bringing group or collective claims which ERISA permits, is invalid. It would prevent the employee from complaining to the Employee Benefits Security Administration about an ERSIA violation affecting herself and others disclosed in the arbitration.

The FUAP would prevent employees from bringing a complaint to OSHA seeking investigation and correction of worksite problems affecting all employees where action after the investigation would be necessary disclosed in the arbitration process.

The FUAP would prevent an employee from filing an EEOC charge that could lead to EEOC court action seeking systemic or class wide relief or any relief disclosed during the arbitration proceeding. It would prevent the employees from participating in systemic charge investigations. 42 U.S. C. § 2000e-8(a). Commissioners may file charges on their own. 42 U.S. C. § 2000e-5(b), which the FUAP would prohibit.

The FUAP would prevent employees from bringing unlawful immigration practices to the attention of the Office of Special Counsel disclosed in the arbitration proceeding. (http://www.justice.gov/crt/about/osc/.)

The FUAP would prohibit actions under the Federal False Claims Act disclosed during the arbitration process/. (http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.) An employee could not, for example, claim that on a federal Davis-Bacon project, the employer made false claims for payment while not paying the prevailing wage disclose during the arbitration. An employee could not claim, along with others,

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FLSA, would not affect commerce. The claim could be based on the promise in the handbook to pay overtime. And because the worker was prohibited from bringing the claim in court, the advancement of that claim for a few dollars of overtime would not affect commerce for FAA purposes.

that the employer is overcharging on a government contract. See *United States v. Circle C Constr.*, 697 F.3d 345 (6th Cir. 2012). This kind of litigation serves an important public purpose but would be foreclosed by the FUAP. This kind of claim is necessarily brought as a group action, since the relief sought includes a remedy for the underpayment of a group of workers.

The FUAP allows the filing of individual claims with only two agencies but does not allow group claims with those agencies. It does not allow charges filed with any other agencies such as the Department of Labor, OSHA and so on. It does not allow joint whistleblowing based on disclosures from the arbitration process.

The FUAP would prohibit an employee from bringing a claim to the Department of Labor that the employer violates the provisions of the Fair Labor Standards Act regarding employment of minors unless the individual were herself an under-aged minor disclosed during the arbitration process.

The FUAP, by its terms, undermines the enforcement of these federal statutes, which envision private efforts to enforce their purposes for all employees and for the public interest disclosed during the arbitration process. .

There is no escaping the conclusion that there are a multitude of federal laws that govern the workplace. The FUAP prohibits an employee acting collectively or to benefit others[16] from seeking assistance before those agencies and in court to effectuate the purposes of those statutes disclosed during the arbitration process. . The FUAP would prohibit the employee from doing so for the benefit of employees acting collectively disclosed during the arbitration process. The purposes of those statutes would include not only individual relief for the employee himself or herself, but also relief that would protect the public interest in enforcement of those statutes.[17]

For these reasons, the FUAP itself is invalid, not only because it would prohibit an

[16] The FUAP would prevent an employee from seeking assistance of others to proceed collectively. An employee could be disciplined for seeking to invoke a collective action on the theory that this would violate the company policy contained in the FUAP disclosed during the arbitration process.

[17] The U.S. Supreme Court has not addressed this issue in any employment arbitration cases since each case has been an individual claim without the argument that the claim serves any public purpose. *Iskanian*, *supra*, is based on that principle.

employee from seeking concerted relief with respect to other federal statutes, but also because it would prohibit the employee from seeking relief that would benefit other employees. The FAA cannot serve to interfere with the enforcement of other federal statutes. As we show, this conflict is particularly heightened with the RFRA, which expressly overrides other federal statutes. The Board should expressly rule that the application of the FAA interferes with important policies under other federal statutes.

VI. THE FUAP WOULD PROHIBIT DISCLOSURES THAT ARE NOT PREEMPTED BY FAA UNDER STATE LAW

The Board did not address this issue.

This issue arises because the FUAP applies in California.[18] The California Supreme Court has ruled that an arbitration agreement cannot foreclose application of the Private Attorney General Act, Labor Code § 2699 and 2699.3. See *Iskanian v. C.L.S. Transp*., 59 Cal.4th 348 (2014), *cert. denied* 135 S. Ct. 1155(2015). See also *Sakkab v. Luxottica Retail N. Am., Inc*., 803 F.3d 425 (9th Cir. 2015). These are representative actions which cannot be foreclosed by an arbitration agreement. As a result the confidentiality provision cannot be enforced.

There are numerous other provisions in the Labor Code that permit concerted action. See, e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert. denied*, 134 S.Ct. 2724 (2014) (arbitration policy cannot categorically prohibit a worker from taking claims to Labor Commissioner, although state law is also preempted from categorically allowing all claims to proceed before the Labor Commissioner in the face of an arbitration policy).

The California Supreme Court has recently ruled that an arbitration procedure cannot limit the right of the worker to use the Berman process. *OTO v. Kho*, 447 P. 3 680 (2019).

The FUAP interferes with the substantive right of the California Labor Commissioner to enforce the wage provisions of the Labor Code. See, e.g., Cal. Lab. Code § 217.

[18] The burden is on the employer to show that there is no other state law that would apply in the same way.

There are, additionally, various provisions in the California Labor Code that allow only the Labor Commissioner to award penalties or grant other relief. The enforcement of the FUAP would prevent employees from collectively going to the Labor Commissioner seeking these penalties for themselves or other employees. It would foreclose an employee from asking the Labor Commissioner to seek remedies for a group of employees. See, e.g., Cal. Lab. Code § 210(b) (allowing only the Labor Commissioner to impose specified penalties); Cal. Lab. Code § 218 (authority of district attorney to bring action); Cal. Lab. Code § 225.5(b) (penalty recovered by Labor Commissioner). IWC Order 16, Section 18(A)(3), *available at* https://www.dir.ca.gov/iwc/IWCArticle16.pdf. Employees could not collectively seek enforcement of these remedies because the FUAP prohibits them from bringing claims collectively to that agency.

The sick pay law may only be enforceable by the Labor Commissioner. See Cal. Lab. Code § 245. The FUAP would foreclose enforcement of this new law. Individuals or groups of individuals do not have the right to enforce the law in court or before an arbitrator. For purposes of this case, it would foreclose concerted enforcement of the new law since the arbitration process would not be authorized to enforce a law given exclusively to the Labor Commissioner. It would prevent other public officers from enforcing state law for a class or group upon complaint by employees. Cal. Bus. & Prof. Code § 17204.

Additionally, under state law, there are a number of whistleblower statutes just as there are under federal law. The FUAP would prohibit employees from invoking those statutes for relief that would affect them as well as others. The Labor Commissioner lists thirty-three separate statutes that contain anti-retaliation procedures. See http://www.dir.ca.gov/dlse/FilingADiscriminationComplaint1.pdf.

California has strong statutory protection for whistleblowers. See Cal. Lab. Code 1102.5. The FUAP defeats the purposes of those statutes that allow groups to bring claims forward to vindicate the public purpose animating those provisions. The confidentiality provision violates these same provisions. Employees could not report violates based on evidence brought forward

in arbitration or complain about the conduct of the employer or its agents in the arbitration process.

Just as the California Supreme Court held in *Iskanian*, there are important public purposes animating these statutes that allow employees to seek assistance from either state agencies or the court system. To prevent employees from seeking relief for other employees in the workplace would effectively deprive them of substantive rights guaranteed by state law. The FAA does not preempt such state laws. See *Iskanian*, *supra*.

The Board must address the question of the application of *Iskanian* and similar doctrines. The FUAP is invalid because it prohibits the exercise of important state law rights, which serves an important public purpose. The confidentiality provision violates state law since it prohibits disclosure to enforce all of these statutes. Once again, the burden is on the employer to prove that the FUAP does not interfere with other non-preempted state law.

VII. THE FUAP UNLAWFULLY PROHIBITS GROUP CLAIMS THAT ARE NOT CLASS ACTIONS, REPRESENTATIVE ACTIONS, COLLECTIVE ACTIONS OR OTHER PROCEDURAL DEVICES AVAILABLE IN COURT OR OTHER FORA

The cases focus on the rights of employees to use collective procedures in courts and other adjudicatory *fora*. Here, we make the point that employees have the right to bring their collective disputes together as a group. Or a group or individual can represent others to bring a group complaint. The FUAP prohibits such group claims or consolidation.[19] It expressly prohibits the "any purported class, collective, consolidated or representative proceeding." [20]

It would prohibit anonymous actions which are permitted under some circumstances. *Does I Thru XXIII v. Advanced Textile Corp*., 214 F.3d 1058, 1068 (9th Cir.2000).

These are claims brought by two or more employees. There is no need to invoke class action, collective action or any procedural form of collective actions. It is just two or more

[19] As to this theory, the Board does not have to address the argument made in those dissents that employees do not have the right to invoke the formalized procedures available in court such as class actions or collective actions.

[20] This language is so broad it will prohibit collective action of a strike since it render s the arbitration procedure as the exclusive remedy.

employees bringing the same claim and assisting each other. Alternatively, it can be two or more employees bringing a complaint that would require the participation of other employees and would affect them. The Board needs to make it clear that such group claims stand apart from class actions, collective actions, and representative actions that invoke court adopted procedures. The Board should address this issue.

VIII. THE FUAP IS INVALID AND INTERFERES WITH SECTION 7 RIGHTS TO RESOLVE DISPUTES BY CONCERTED ACTIVITY OF BOYCOTTS, BANNERS, STRIKES, WALKOUTS AND OTHER ACTIVITIES

The FUAP is invalid because it makes it clear that the employees are limited to the arbitration procedure to resolve disputes. It applies to "all disputes that may arise out of or be related in any way to my employment" not just disputes that could be brought in a court or before any agency. It governs "all disputes which may arise out of the employment context." This would foreclose the employees from engaging in strikes or boycotting activity, expressive activity or other public pressure campaigns. This is a yellow dog contract. Here, employees are forced to agree that they shall use only the arbitration procedure to resolve disputes with the employer, and thus they would be violating the arbitration procedure if they were to use another more effective forum, such as a public protest or a strike.[21] It prohibits all forms of concerted activity because it requires that employees use the arbitration procedure. Any employee who violates this rule would be subject to discipline just as he/she would be for violating any other employer rule. This is a fundamentally illegal forced waiver of the Section 7 right to engage in lawful economic activity, including boycotting, picketing, striking, leafleting, bannering and other expressive activity. That language is contained in the FUAP.[22]

[21] There is nothing in the arbitration provision which protects an employee from attempting to bring joint or consolidated claims with other employees or violating the confidentiality provision. Presumably like other employer rules an employee who disclosed his favorable win in arbitration could be fired for disclosing it. The FUAP does not contain language assuring employees that they will not be disciplined. . That would apply to even disclosure in a lawsuit to enforce the award. Or disclosure in a related case against a manager who was responsible for the illegal conduct.

[22] The attempted exculpation in Paragraph 4 similarly does not save the provision. The board has rejected the proposition that similarly worded phrases which contain the language of the statute do not save overbroad provisions. They serve more to create confusion.

That concerted activity could certainly include seeking a Union's assistance in negotiating a better arbitration provision or in invoking the FUAP. Fundamentally, it also would make it unlawful to engage in Union activities such as a strike, picketing, bannering or other concerted activity. The Board's recognition that the FUAP is an unlawful yellow dog contract under the Norris-LaGuardia Act, reaffirms that but does not go far enough. If the FUAP is unlawful under the Norris-LaGuardia Act and Section 7, it is unlawful because it prohibits other concerted means of resolving disputes. Employees are not limited to bringing claims concertedly before courts or agencies.[23] They can do so by direct action.

The FUAP is an unlawfully imposed no-strike, no boycott, no bannering, no leafleting and no concerted activity ban. It is the worst form of a yellow dog contract.

IX. THE FUAP AND ITS CONFIDENTIALITY PROVISION PROHIBIT THE EXERCISE OF THE JOINT RIGHT TO ASSERT RES JUDICATA AND COLLATERAL ESTOPPEL

The FAA cases make it clear that employees may not be forced to waive statutory rights in arbitration. the Supreme Court held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). The Board ignores the effect of the confidentiality provision which is to deprive employees of this important substantive right. Importantly an employer could not assert these doctrines against another employee but an employer working with other employees could assert these doctrines against the employer. This is the loss of an important substantive right which the FAA does not permit.

X. THE FUAP UNLAWFULLY PROHIBITS JOINT ACTION

This FUAP has the specific reference to prohibiting "consolidation or joinder." This

[23] Surely every employer would rather force employees to resolve disputes in the least friendly fora: the courts and arbitration. The Norris-LaGuardia Act and the NLRA protect the right of employees to settle disputes in the most effective manner: collective action in the streets. See, *On Assignment Staffing Services*, 362 NLRB No 189 (2015).

undefined ambiguous term would prohibit even one employee from acting jointly with another employee to help each other bring individual claims. It would prohibit them from referring to other claims or invoking the doctrine of *res judicata* or *collateral estoppel*. To the extent it is ambiguous; it must be construed against the employer.

It would prohibit employees from jointly asking a supervisor to resolve disputes since purportedly covers "all disputes that may arise out of or be related in any way to may employment. In effect the FUAP if enforceable prohibits all open door policies but for this case would prohibit any joint efforts by employees to resolve disputes without any formal procedures.[24]

XI. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT SALTING AND APPLIES AFTER EMPLOYMENT ENDS

The FUAP would extend to someone who became employed for the purpose of salting, improving working conditions and organizing since it would restrict his/her right to engage in concerted activity and organize. It would prohibit the salt from assisting other employees in pursuing collective claims. Moreover, the FUAP purports to govern even after an employee quits or is fired. If the employee chooses to quit because of miserable working conditions or to organize, she is barred from acting collectively. Respondent cannot bar an employee who has terminated any employment agreement from acting collectively on behalf of either current employees or other former employees.[25]

XII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT FORECLOSES GROUP CLAIMS BROUGHT BY A UNION AS A REPRESENTATIVE OF AN EMPLOYEE OR EMPLOYEES

The FUAP prohibits a union that represents an unrepresented employee from representing that employee in the arbitration procedure. That is, it would prohibit a union from acting on behalf of an employee, not as the collective representative of the group, but rather as the representative of the individual employee. It would also prevent a union from acting as the

[24] The resolution of this issue will fact the scope of the relief and the notice.

[25] California prohibits non-compete clauses. This would conflict with such provisions.

minority representative or members-only representative of an employee or group of employees.

Such activity is protected. It would prevent a union from acting on behalf of a group of employees.

The FUAP confidentiality agreement prevents the employee from disclosing the fact of arbitration of the contents to a union which was organizing or which is the representative of he employees.

The FUAP prohibits a union that is recognized or certified from representing employees.

The FUAP would prevent a union, as the representative of its members, or non-labor organization worker center from representing its members where authorized under state or federal law. See *Soc. Servs. Union, Local 535 v. Santa Clara Cty.*, 609 F.2d 944 (9th Cir. 1979) (Union may act as representative of its members in class action); *United Food & Commercial Workers Union Local 751 v. Brown Group., Inc.*, 517 U.S. 544 (1996) (union has associational standing on behalf of its members); *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274 (1986).[26] See *Brotherhood of Teamsters v Unemployment Insurance Appeals Board*, 190 Cal. App 3d 1517 (1987)(California law allows union to have standing on behalf of its members)[27]

XIII. THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES ADDITIONAL COSTS ON EMPLOYEES TO BRING EMPLOYMENT RELATED DISPUTES

This FUAP contains a fundamental flaw in that it would require an employee to pay arbitration costs limited only by the amount the employee would have to pay in court. Thus, it necessarily increases the costs to employees who bring claims concerning working conditions. This is particularly a flaw in California, where the Berman Hearing process is free to an employee. See Labor Code § 98 Thus if one employee sought to bring an issue to the Labor

[26] It would prohibit an employee from joining a non-labor organization that brought litigation against the employer on issues affecting working conditions. An employee could not join a worker center, for example, that brought claims by other employees.

[27] The California Labor expressly allows representatives such as union to raise claims. See Labor Code Section, 1198.5(b)(1). Alone the confidentiality provision is unlawful for this reason.

Commissioner on behalf of others, that employee would incur no costs. In effect, a penalty is imposed on the employee because he or she has to pay the arbitration costs even limited by court costs where there is a free procedure under the Labor Commissioner system under Labor Code § 98.[28] The Act does not permit an employer from forcing employees to pay anything, not one cent, to exercise their section 7 rights.[29] Because employees can bring concerted claims without cost to the Labor Commissioner, the FUAP is unlawful.

Under California law an employee must hire an attorney to represent him in any arbitration since it is deemed the practice of law. The employee can represent himself at great risk. There is another avenue for the employee to have non-attorney representation or free representation through the Berman hearing process. Labor Code section 98. The FUAP places this additional burden and expense on employees acting individually and concertedly.

Furthermore, employees cannot share expert witness fees, deposition costs, copying costs, attorney's fees and many other costs associated with bringing and pursuing claims. Bringing them as a group includes sharing those costs. Sharing costs is concerted activity. Thus, the FUAP expressly penalizes workers by increasing their costs in violation of Section 7.

The FUAP would prevent a federally recognized Joint Labor Management Committee from pursuing claims. See 29 U.S.C. § 175(a).[30]

On all these grounds, the FUAP is unlawful.

XIV. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN EMPLOYEE OF ANOTHER EMPLOYER FROM ASSISTING AN EMPLOYEE OF RESPONDENT OR JOINING WITH AN EMPLOYEE OF RESPONDENT TO BRING A CLAIM

Separately, an employee of any other employer is also an employee within the meaning of the Act. *Eastex v. NLRB*, 437 U.S. 556 (1978). Such other employee could assist an

[28] The agreement purports to waive the procedure of the California Code of Civil Procedure to vacate arbitration awards. See Paragraph 6. A Second arbitration cost would impose further costs on the employee.

[29] Nor does it allow the employee to seek a fee waiver.

[30] It is not contradictory to refer to the rights under federal statutes and raise the question of commerce jurisdiction with respect to the FAA. The difference is that the FAA regulates dispute resolution or the employment dispute, not the business or commerce activity of the employer.

employee of Respondent or join with a claim brought by an employee of Respondent. The rights of all other employees of other employers are violated by the FUAP independently of whether it violates just the Section 7 rights of Respondent's employees. The FUAP cannot apply to an employee of another employer, nor can it prohibit an employee of Respondent from joining with an employee of another employer.

Furthermore, it would prohibit employees of Respondent from bring group complaints with employees of "its owners, directors, officers, managers, employees, or agents" described in the FUAP even though those "affiliates, subsidiaries, officers, directors, agents, attorneys, representative and/or other employees" are not parties to the FUAP.[31]

XV. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT APPLIES ONLY TO CALIFORNIA COMMERCE CLUB AND NOT ITS EMPLOYEES

THE FUAP does not apply to claim brought against management or supervisors. Thus employees may proceed against the individual managers in court while forced to proceed in arbitration. This would prevent

There are many wage and hour statutes, including the Fair Labor Standards Act, the California Fair Employment and Housing Act and provisions of the Labor Code that can impose joint liability.[32]

The FUAP cannot apply to non-parties to any agreement with the employees. *First Options v. Kaplan*, 514 U.S. 938 (1995). The same is true under state law. *Matthau v. Superior Court,* 151 Cal.App.4th 593, 598 (2007).

The provision forces workers to proceed in two fora and prevents joint action.

The confidentiality provision would prohibit the employee from disclosing in the court proceeding against the supervisor who is responsible for the illegal conduct what occurs in the arbitration. The employee could not disclose to other employees who may have the same claims

[31] It is not "mutual" and is invalid for this reason.

[32] In addition, this effort to limit claims against benefit plans is prohibited by ERISA, 29 U.S.C. § 1140, since it interferes with the rights of employees to bring claims against benefit plans.

against the same manager or supervisor.

XVI. THE FUAP VIOLATES STATE LAW

California prohibits an agreement not to disclose working conditions and wages. Labor Code sections 232 and 232.5. The FUAP violates these provisions. The FAA recognizes that provision which are not valid "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. section 2. This state law would invalidate any agreement not to disclose wages or working conditions and doesn't target arbitration. It is invalid and not saved by the FAA.[33] The Board's suggestion that the language must be enforced "absent a contrary congressional command" is wrong. Decision p 5. The saving clause quoted above is a congressional command that arbitration agreements which are invalid under state or federal law may not be enforced. This would include the congressional command recognize by the Board that confidentiality clause are invalid.

It also violates various provisions of state law prohibit non-disclosure agreements. California Civil Code section 1670.11; Government Code section 12964.5 and Code of Civil Procedure section 1001. This violates new federal law. 26 U.S.C. § 162(q). The Board must apply current law and these statutes invalidate the FUAP's confidentiality provision.

The Board cites two totally irrelevant cases from the commercial context that confidentiality provisions are enforceable. *Guyden v Aetna, Inc*., 544 F. 3d 376 (2d Cir 2008) and *Iberia Credit Bureau v Cingular Wireless*, 379 F 3d 159 (5th Cir 2004).[34] In neither case was a there a statutory provision protecting the right of one party to disclose information. Here state law protects that right. Federal law protects that right. State and federal whistleblower statutes protect that right. The Board's reliance on two cases where there was no right of disclosure demonstrates the poverty of the Board's decision. The Board is charged with protect section 7

[33] It is for this reason the limitation on whistleblowing or reporting violations contained in the confidentiality provision is invalid.

[34] If the confidentiality clause were limited to trade secrets or proprietary information, it would not be unlawful.

rights but it has totally abandoned that obligation here in favor of doctrines from other legal regime which have no such interest at stake.

XVII. THE FUAP VIOLATES ERISA

The FUAP violates ERISA. Because it extends to any dispute this would include disputes over benefit plans and this runs contrary to the Department of Labor regulation prohibiting mandatory arbitration. See 29 C.F.R. § 2560.503-1(c)(4); see *Snyder v. Federal Insurance Co* ., 2009 WL 700708 (S.D. Ohio 2009) (denying arbitration relying on the DOL regulation). We recognize that a plan may require exhaustion of its remedies including arbitration, but that's only a function of exhausting the plan arbitration clause prior to bring a court action. See *Chappell v. Laboratory Corporation America*, 232 F.3d 719 (2000); see also *Engleson v. Unum Life Insurance Co.,* 723 F.3d 611 (6th Cir. 2003); see also 29 U.S.C. § 1133.

Additionally, this language violates the right of employees to invoke procedures under the employee benefit plans, rather than under this FUAP.[35] ERISA requires that there be an arbitration procedure to bring claims against benefit plans. This effectively preempts ERISA by requiring employees to use this procedure rather than the procedure adopted by the benefit plans. See 29 U.S.C. § 1133.

XVIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM

Employees have the right to band together to defend against claims made by the Employer or other employees. Although an employee might choose to refrain from concerted activity against the employer, that employee may wish to engage in joint activity where there are joint or related claims against several employees.

The FUAP imposes a very heavy burden on employees who may be jointly the subject of a claim by the company against them. Under the FUAP, they could not jointly defend

[35] Respondent by imposing this arbitration requirement has become the administrator of the plans and a fiduciary to the plans.

themselves but would have to defend themselves individually in separate actions. The employer may have claims against multiple employees, such as overpayments for wages or breach of confidentiality provisions. There may be cross-claims, counter-claims, interpleader or claims for indemnification. There may be claims for declaratory relief against the employer or other employees. The employees are entitled to defend such claims or pursue such claims jointly and concertedly.[36] The FUAP is facially invalid since it prohibits group action to defend against claims jointly.[37]

XIX. THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA ACT AND CALIFORNIA LABOR CODE SECTION 1138.1

The Norris–LaGuardia Act, 29 U.S.C. § 101 et seq., states that, as a matter of public policy, employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives [of their own choosing] or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[38] 29 U.S.C. § 102 (emphasis added). The Act declares that any "undertaking or promise in conflict with the public policy declared in section 102 . . . shall not be enforceable in any court of the United States." 29 U.S.C. § 103. The FUAP plainly interferes with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed by the Norris-LaGuardia Act. This argument is fully explored in the law review article written by Professor Matthew Finkin, "The Meaning and Contemporary Vitality of the Norris-LaGuardia Act," 93 Neb L. Rev 1 (2014). He forcefully argues that an agreement to waive collective actions is a quintessential yellow dog contract prohibited by the Norris-LaGuardia Act. We repeat this here to reinforce our arguments. Even if *Epic Systems* rejected this argument as to

[36] The FUAP specifically prohibits "consolidation or joinder of other claims or controversies." This would be a useful procedure for employees to concertedly defend claims.

[37] For example, employees would have to hire lawyers who would cost more for individual representation. Employees could not share the costs of expert witnesses, document production, depositions etc. The simple fact that individual actions increase the costs on the workers makes it a penalty and violates Section 7.

[38] The Commerce standard for the Norris-LaGuardia Act is much broader than the "transactional" standard of the FAA. See 29 U.S.C. Section 113 (defining broadly labor dispute).

agreements governed by the FAA, it did not do so as to confidentiality provisions nor did it concern state law prohibitions. Here the argument applies separately to the confidentiality provisions which violate 29 U.S.C. Section 104(e). See also California Labor Code section 1138.3; California Code of Civil Procedure § 527 and Labor Code section 1102.5.

XX. THE REMEDY

The employer should be required to post permanently the Board's ill-fated employee rights Notice. https://www.nlrb.gov/poster The Courts that invalidated the rule requiring the Notice posting indicated that such a Notice could be part of a remedy. The groups that opposed it argued it could only be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that Notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of 60 days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with any payroll statements. See California Labor Code Section 226.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. That Notice reading should require that a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behavioralists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-way communication is vital to effective transmission of the intended message, as it "clarifies

ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions…" The employer should not be present. The Union should be notified and allowed to be present. This should be on work time and paid. If the employees are working piece rate the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The employer should not be allowed to implement a new FUAP. A new FUAP can only occur after there has been a complete remedy of the violations found in this case. In other words, the Employer may not implement any new policy until after it has completely remedied this case by rescinding all the unlawful policies, posting an appropriate notice allowing employees to take appropriate legal action without the implementation of any purported forced arbitration wavier.

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We illegally maintained a Mutual Arbitration Procedure. We have rescinded that unlawful policy. We have agreed to toll the statute of limitation for any claims which employees may have.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

The employees should be allowed work time to read the Board's Decision and Notice. To

require that they read the Notice whether by email, on the wall or at home on their own time is to punish them for their employer's misdeeds.

The employer should be required to toll the statute of limitations for any claims for the period during which the FUAP has been in place until a reasonable time after employees receive the notice so that they may assert any collective or group claims that they have. Otherwise, the Employer would have had the advantage of forestalling and foreclosing group claims. This would give employees an opportunity to learn that the FUAP has been rescinded and that they may bring group or collective claims.

Interest should be awarded on any claims which are tolled.

The Notice should be read to employees by a Board agent outside the presence of management. Representatives of the Charging Party should be present. Employees should be allowed to ask questions.

XXI. CONCLUSION

Respondent's FUAP is unlawful. The Board should find it is unlawful and order the remedies sought in this case by the Charging Party. The confidentiality provision is unlawful. In an absurd way it would prevent a worker from even reporting the some dispute was resolved without risking being fired.

Dated: July 17, 2020

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ DAVID A. ROSENFELD
By: DAVID A. ROSENFELD

Attorneys for Charging Party WILLIAM J. SAUK

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on July 9, 2020, I electronically filed the forgoing Motion for Reconsideration with the National Labor Relations Board.

On July 17, 2020, I served the following documents in the manner described below:

MOTION FOR RECONSIDERATION

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following parties in this action:

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I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on July 17, 2020.

/s/ Katrina Shaw
Katrina Shaw